LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA A

v.

SHAHARUDIN OMAR & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-21-112-2004]
14 FEBRUARY 2008

CIVIL PROCEDURE: *Summary judgment - Appeal for - Recovery of unpaid EPF contributions - Whether plaintiff must prosecute defendant for criminal offence before instituting civil proceedings - Whether s. 46 of the Employees Provident Fund Act 1991 unconstitutional - Whether defendant liable to make contributions - Whether suit against third defendant unlawfully instituted - Employees Provident Fund Act 1991, ss. 14, 45, 65* C D

This was an appeal to the judge in chambers by the plaintiff against the decision of the senior assistant registrar dismissing the plaintiff's application for an O. 14 summary judgment against the third defendant. The plaintiff, the Employees Provident Fund Board ('the board') had commenced this writ action against the defendants, who at the material time were directors of a company known as Syarikat Long Huat Marketing Sdn Bhd ('the company') to recover unpaid EPF contributions in respect of the employees of the company due from the company. The amount of contributions claimed was RM388,800. The liability of the company to pay the EPF contributions is found in s. 45 of the Employees Provident Fund Act 1991 ('the Act'). But where a company fails to pay the contributions, then, apart from the company, the directors of the company were also liable for the failure to pay (s. 46 of the Act).The third defendant, however, argued that there were four triable issues which were (a) whether the plaintiff must first prosecute the defendant for a criminal offence before instituting civil proceedings; (b) whether s. 46 of the Act was unconstitutional; (c) whether it was the defendant's company that was liable to make the contributions and (d) whether the suit against the third defendant was unlawfully instituted. E F G H I

A **Held (allowing the appeal):**

(1) Section 65(1) of the Act implies that a civil proceeding can be instituted against the directors independently of any criminal prosecution against the company or the directors. Under the B scheme of the Act, the board had a choice: the board could either prosecute the company (or its directors) for a criminal offence in respect of the company's failure to pay, or to institute a civil proceeding against the company (or its directors). There was no merit in the contention that before a C civil proceeding could be instituted against the directors to recover the unpaid contributions, the company or the directors of the company must first be prosecuted for a criminal offence under the Act in respect of the failure to pay the contributions. (paras 8 & 9)

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(2) Section 46 of the Act does not create a strict liability offence. The board of directors of a company is the alter ego of the company. Hence, it was logical legally for s. 46 to make the directors liable for any non-payment of EPF contributions by the company. (para 11)

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(3) The third defendant did not furnish the court with any documentary evidence to support his claim that the employees named were the employees of Long Huat Group Bhd and not the employees of Syarikat Long Huat Marketing Sdn Bhd. F The plaintiff, on the other hand, in their affidavit evidence produced convincing documentary evidence to show that the employees belonged to Syarikat Long Huat Sdn Bhd. (para 12)

G **(4)** These proceedings were instituted by the board and not by the firm of Messrs Mazwan Pathma & Co. The said firm of solicitors was only acting on behalf of the board, that was the plaintiff. The said firm of solicitors was not instituting the proceedings against the third defendant on their own volition. H Under the Act, the board may also employ solicitors for the purpose of instituting or conducting court proceedings to recover unpaid contributions (s. 65(1) read together with s. 14(3) of the Act). Section 14(3) is sufficiently wide so as to empower the board to employ 'advocates and solicitors …' I The phrase 'the exercise of its powers' certainly would include the power of the board to recover summarily civil debts as conferred on the board by s. 65(1). (para 20)

Case(s) referred to:
KM Nathersahib & Another v. Meyer Bros [1940] MLJ 252 ***(refd)***

Legislation referred to:
Employees Provident Fund Act 1991, ss. 14(3), 43(2), 45(1), 46(1), 63, 65(1), (2), 67

For the plaintiff - Latipah Husin; M/s Mazwan Pathma & Co
For the defendant - Bernard Gomez; M/s Bernard Gomez & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Yunus J:

[1] Enclosure 24 is an appeal to the judge in chambers by the plaintiff against the decision of the learned senior assistant registrar who had dismissed the plaintiff's application for an O. 14 summary judgment against the 3rd defendant (judgment has already been obtained against the 1st and 2nd defendant).

[2] The plaintiff, the Employees Provident Fund Board ('the Board'), has commenced this writ action against the defendants, who at the material time were directors of a company known as Syarikat Long Huat Marketing Sdn Bhd ('the company'), to recover unpaid EPF contributions in respect of the employees of the company due from company. The amount of contributions claimed is RM388,800.

[3] The liability of the company to pay the EPF contributions is found in s. 45 of the Employees Provident Fund Act 1991 ('the Act'). Subsection (1) of s. 45 reads:

> **Payment of contributions.**
>
> 45(1) Except where otherwise provided in this Act, the employer shall, in the first instance, be liable to pay both contributions payable by himself and also, on behalf of and to the exclusion of the employee, the contributions payable by that employee; and for the purposes of this Act contributions paid by an employer on behalf of an employee shall be deemed to be contributions by the employee.

[4] For the purposes of the Act, the company is an 'employer' (see s. 3 of the Act, in particular, the definition of 'employer'). But where a company fails to pay the contributions, then, apart from the company, the directors of the company are also liable for the failure to pay. This is provided for by s. 46 of the Act. Subsection (1) of s. 46 reads:

> **Joint and several liability of directors, etc.**
>
> 46(1) *Where any contributions remaining unpaid by a company,* a firm or an association of persons, *then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid,* or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office bearers of such association of persons, including any persons who were the office bearers of such association during such period in which contributions were liable to be paid, as the case may be, *shall together with company,* firm or association of persons liable to pay the contributions, *be jointly and severally liable for the contributions due and payable to the Fund.* (emphasis added)

[5] The appeal that is now before me only concerns the 3rd defendant (as pointed out earlier, judgment has already been obtained against the 1st and 2nd defendants).

[6] I had allowed the appeal with costs, and I now give my grounds.

[7] In my judgment there are no triable issues. The 3rd defendant argues that there are four triable issues. But I find no merits in the arguments advanced by his counsel before me. I shall deal with the suggested issues one by one.

Whether The Plaintiff Must First Prosecute The Defendant For A Criminal Offence Before Instituting Civil Proceedings

[8] It is true that under s. 43(2) of the Act, the company (or its directors) can be prosecuted for the failure to pay the contributions. However, I find there is no merit in the contention that before a civil proceeding can be instituted against the directors to recover the unpaid contributions, the company or the directors of the company must first be prosecuted for a criminal

offence under the Act in respect of the failure to pay the contributions. On the contrary, s. 65(1) of the Act implies that a civil proceeding can be instituted against the directors independently of any criminal prosecution against the company or the directors. Subsection (1) of s. 65 provides:

> **Civil proceedings to recover contributions**
>
> 65(1) Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

[9] In my view, under the scheme of the Act, the board has a choice: the Board can either prosecute the company (or its directors) for a criminal offence in respect of the company's failure to pay, or to institute a civil proceeding against the company (or its directors). However, if the board were to choose to institute criminal proceedings then the mode of recovery of the unpaid contributions would be by the procedure as prescribed by s. 63 of the Act.

[10] The case of *K.M. Nathersahib & Another v. Meyer Bros* [1940] MLJ 252 cited by the learned counsel for the defendant is irrelevant as the facts there are different from the facts in this case. The case does not concern the Act. Moreover, it must be noted that the broad proposition of law as cited by the counsel for the defendant, that is:

> When an act is both a crime and a civil wrong, prosecution for the criminal offence is generally a condition precedent to a civil action in tort at any rate in the case of a non-compoundable offence.

is merely an extraction from the head-notes of the case as reported in the law report. I have serious doubts as to whether what is stated in the head-notes of the case is truly the *ratio decidendi* of that case.

Whether s. 46 Of The Act Is Unconstitutional

[11] It is argued by the defence that s. 46 of the Act is unconstitutional as that provision creates a 'strict liability' for the directors. I see no merit in this argument. In the first place s. 46 does not create a strict liability offence. Secondly, the board of

directors of a company is the alter ego of the company. Hence, it is logical legally for s. 46 to make the directors liable for any non-payment of EPF contributions by the company.

Whether It Is The Defendant's Company That Is Liable To Make The Contributions

[12] The 3rd defendant contends that the company, Syarikat Long Huat Marketing Sdn Bhd, is not the company that is liable to pay the salary of the employees named. The 3rd defendant argues that the employees named by the plaintiff are not the employees of the defendant, but the employees of a company known as Long Huat Group Bhd. There is no merit in this contention too. The 3rd defendant does not furnish the Court with any documentary evidence to support his claim that the employees named are the employees of Long Huat Group Bhd and not the employees of Syarikat Long Huat Marketing Sdn Bhd. The plaintiff, on the other hand, in their affidavit evidence produces convincing documentary evidence to show that the employees belonged to Syarikat Long Huat Sdn Bhd.

Whether The Suit Against The 3rd Defendant Was Unlawfully Instituted

[13] It is to be observed that the present writ action was filed by a firm of solicitors, Messrs Mazwan Pathma & Co. Now, it is the contention of the 3rd defendant that by reason of ss. 65 and 67 of the Act only:

(a) a Federal Counsel authorized by the Attorney General;

(b) a legal officer of the board authorized by the Chairman of the board; or

(c) an officer of the board authorized by the Chairman of the Board,

may institute the present legal proceedings against the 3rd defendant. Any other person, such as a firm of solicitors, cannot legally do so.

[14] Section 67 of the Act stipulates:

Conduct of civil proceedings

67. Notwithstanding the provisions of any written law, but without prejudice to section 65, in any civil proceedings by or against the Board:

(a) any person holding the appointment of a Federal Counsel and authorized by the Attorney General for the purpose; or

(b) any legal officer of the Board authorized in that behalf by the Chairman,

may, on behalf of the Board, institute, appear in and conduct such proceedings and may make and do all appearances, acts and applications in respect of such proceedings.

[15] Section 65(2) of the Act states:

(2) Proceedings for the summary recovery as civil debts of contributions may be instituted by any officer authorized in that behalf by special or general directions of the Chairman and any such officer may conduct such proceedings.

[16] It is submitted by the counsel for the 3rd defendant that the firm of solicitors, Messrs Mazwan Pathma & Co, who has filed the present writ action, has no legal authority to institute the present action against the 3rd defendant. With respect, I am unable to accept this argument. First and foremost, one thing must be clear in our minds to avoid any confusion: just because the writ and statement of claim (as well as other cause papers) are filed by the said firm of solicitors, it cannot be concluded that the said firm of solicitors on their own volition is instituting the proceedings against the 3rd defendant. These proceedings are in fact instituted by the board and not by the firm of Messrs Mazwan Pathma & Co. The said firm of solicitors is only acting on behalf of the board, that is, the plaintiff. Indeed, the writ and statement of claim (as well as all other cause papers) are endorsed at the end with the words:

PERNYATAAN TUNTUTAN INI difailkan oleh Tetuan Mazwan Pathma & Co Peguamcara bagi Plaintiff yang dinamakan di atas yang mempunyai alamat penyampaian …

[17] That Messrs Mazwan Pathma & Co is employed by the board/plaintiff to file the action and to act on behalf of the board in the present proceedings is confirmed by the affidavit evidence of the board's legal officer at encl. 23.

[18] It is true that under the scheme of the Act the power to institute legal proceedings to recover civil debts due to the board is, apart from the board, also vested in the three classes of persons just mentioned. However, under the Act, the board may also employ solicitors for the purpose of instituting or conducting court proceedings to recover unpaid contributions. That the board has such a power can be gathered by reading s. 65(1) together with s. 14(3). Section 65(1) states:

> **65. Civil proceedings to recover contributions**
>
> (1) Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

[19] Section 14(3) provides:

> **14. Powers and duties of the Board**
>
> …
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> …
>
> (3) The Board may employ and pay agents, advocates and solicitors, bankers, stockbrokers or any other persons, to transact any business or do any act required to be transacted or done in the exercise of its powers or in the carrying out of its duties or for the better carrying into effect of the purposes of this Act.

[20] The 3rd defendant also seems to suggest that the board legally cannot utilize the services of a firm of solicitors for the purpose of instituting civil proceedings to recover civil debts, and that by reason of s. 67 of the Act the board can only make use of the services of its legal officers and of the Federal Counsel for such purposes. With respect, I am unable to accept such a contention. In my judgment the provision of subsection (3) of s. 14 is sufficiently wide so as to empower the Board to employ 'advocates and solicitors … to do any act required to be … done in the exercise of its powers or in the carrying out of its duties …'. The phrase 'the exercise of its powers' here certainly would include the power of the board to recover summarily civil debts as conferred on the board by subsection (1) of s. 65.

[Appeal allowed with cost.]